In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 701

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR THE APPELLANT AND THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN OPPOSITION TO THE MOTION TO DISMISS

In their Motion to Dismiss, appellees abandon their prior attempts to sustain the Idaho motor fuels levy as "a tax upon the 'deal.' "[1] For the first time, they argue (Motion, pp. 5–8) that what the statute describes as an "excise tax of six cents per gallon" imposed upon dealers who sell motor fuels outside Idaho for importation into the State (9 Idaho Code 49–1210) (J.S. 37a) is not a tax at all but is really a "toll" im-

[1] Brief of P. G. Neill, et al., in the Supreme Court of the State of Idaho, p. 7.

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posed upon consumers for the use of the State's highways.[2]

These novel contentions are in direct conflict with the decision of the highest court of the State of Idaho in this very case. It held that the levy is an "excise tax" which falls "on the 'dealers' as that term is defined by statute" (J.S. 19a). That court described the taxable incident as the "receiving" of fuel by a dealer (J.S. 8a).[3] This interpretation of the State statute by the highest court of the State is, of course, conclusive and binding here. *Bingaman* v. *Golden Eagle Lines,* 297 U.S. 626, 628; *Clement Nat'l Bank* v. *Vermont,* 231 U.S. 120; *Mackay Telegraph Co.* v. *Little Rock,* 250 U.S. 94; *Scripto* v. *Carson,* 362 U.S. 207. Accordingly, it is a complete answer to appellees' argument.[4]

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[2] Appellees' reversal of position emphasizes the dilemma of the State taxing authorities, as explained in our Jurisdictional Statement (*e.g.*, J.S. 14): If the tax is a sales tax, its incidence is on a transaction which occurred outside of Idaho and therefore outside Idaho's taxing jurisdiction; if the tax be deemed one on the privilege of importing fuel into the State of Idaho, it is invalid under the Commerce Clause; and if, as appellees now claim, its incidence is on the use of the fuel inside the State of Idaho, with the dealer serving merely as collector, it is invalid as a direct tax on the United States, the only user within the State.

[3] Similarly, the State District Court in this case characterized the tax as an excise tax whose incidence is on the dealer (J.S. ~~30a).~~ 29a).

[4] Appellees' remaining contentions (Motion, pp. 8-21) that the levy is consistent with the Due Process Clause of the Fourteenth Amendment and the Commerce and Supremacy Clauses similarly rest upon the erroneous premise that the levy is a toll upon consumers rather than an excise tax upon dealers.

The State court's interpretation is directly supported by the express words of the statute,[5] as well as by formal opinions of the Attorney General of the State of Idaho and of the Comptroller General of the United States. Thus, in an opinion of May 9, 1950, addressed to Counsel, United States Atomic Energy Commission, the State Attorney General ruled as follows:[6]

> The Motor Fuels Act does not lay a tax on any purchaser or vendee. On the contrary, it taxes the dealer or vendor. The dealer is not required to collect the tax from the purchaser * * *.

The Comptroller General of the United States reached the same conclusion in decisions dated June 22, 1945 (24 Comp. Gen. 919), and November 5, 1951 (unpublished, but reproduced in full at pages 78–83 of the typewritten record filed with the Jurisdictional Statement herein).[7] The latter states, in part (typewritten record, p. 82):

> * * * the tax is not laid upon the purchasers of motor fuel in Idaho but is merely a privilege tax imposed upon persons engaging in the motor fuel business within that State * * *.[8]

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[5] The tax is described by statute as an "excise tax" payable by "each and every dealer." Idaho Motor Fuels Tax Act, as amended, 9 Idaho Code 49–1210 (J.S. 37a).

[6] This opinion was quoted at pp. 23–24 of the American Oil Company's brief before the Supreme Court of Idaho.

[7] The typewritten record erroneously records the date of the 1951 decision as 1961.

[8] There is no basis for appellees' suggestion (Motion, pp. 2, 20) that these decisions are of help to it here. The 1951 ruling authorized payment of the Idaho Motor Fuels Tax as passed

The fact that the tax monies do not go for the support of the general government of the State but are used for road purposes does not convert the tax into a toll for the use of its highways. An identical argument was presented and rejected in *Bingaman* v. *Golden Eagle Western Lines,* 297 U.S. 626, where this Court held that the State levy was unconstitutional as an excise tax which imposed a direct burden upon interstate commerce.[9]

Respectfully submitted.

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on by the dealers to contractors of the Department of Agriculture with respect to sales *within* the State. The decision was based on this Court's holding in *Alabama* v. *King & Boozer*, 314 U.S. 1, sustaining a tax whose legal incidence was on the vendor even though the ultimate economic impact was on the United States as vendee. Since the ruling had reference to sales occurring within the State of Idaho, it cannot be construed as "in favor of Idaho" (Motion, p. 2) in this case, where the objection to the tax is that it was imposed on sales occurring in Utah, outside the jurisdiction of Idaho.

[9] Appellees' reliance on *Tirrell* v. *Johnston*, 86 N.H. 530, 171 Atl. 641, affirmed, 293 U.S. 533, is misplaced. Tirrell was a rural mail carrier who sought exemption from a State tax or

toll imposed on those who purchased gasoline for highway use. His plea was rejected on two grounds: first, because a toll, as opposed to a tax, could be exacted from a federal instrumentality; and second, because, even if the exaction were considered a tax, its incidence was not directly on the United States, since the gasoline was purchased by a private individual. This Court affirmed solely on the second ground: every case cited in the *per curiam* affirmance turned on the issue of whether the direct incidence of the disputed tax was on the federal government. It is only in the context of this issue that the *Tirrell* case has been subsequently cited as authority. See, *e.g.*, *Taber* v. *Indian Territory Co.*, 300 U.S. 1, 4; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 163. *Clinton* v. *State Tax Commission*, 146 Kan. 407, 410, 71 P. 2d 857, 859; *Geery* v. *Minnesota Tax Commission*, 202 Minn. 366, 370, 278 N.W., 594, 596. Thus, *Tirrell* is distinguishable on two grounds: (1) the incidence of the tax (or toll) there was on the purchaser rather than the vendor; and (2) the purchaser was not the federal government, but a private contractor. Further, that branch of the holding which may be construed as standing for the proposition that a State may exact a toll, as distinguished from a tax, from the United States, was not affirmed by this Court and has apparently not been followed as a precedent by other courts.

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